

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

Harak Chand Vs. The State of Rajasthan
(S.B. CRIMINAL APPEAL NO.213/1988)

S.B. Criminal Appeal under Section 374 (2)
Cr.P.C. against the judgment dated 20.5.1988
passed by the Additional Sessions Judge,
Barmer in Sessions Case No.12/1988.

Date of Judgment:

APRIL 13,2007

P R E S E N T

HON'BLE MR.JUSTICE BHANWAROO KHAN

Mr.Doongar Singh, for the appellant

Mr.L.R.Upadhyaya, Public Prosecutor

BY THE COURT:

1. The appellant Harak Chand was convicted by the Additional Sessions Judge, Barmer vide judgment dated 20.5.1988 for offence under Section 18 of the Narcotics, Drugs & Psychotropic Substances Act (in

short the N.D.P.S. Act) and sentenced to undergo 10 years rigorous imprisonment and a fine of Rs. 1 Lac; in default thereof to further undergo 1 year rigorous imprisonment.

2. According to the prosecution, the brief facts of the case are that on 16.7.1987 at about 9.30 A.M. Padam Singh Ratnu the S.H.O., Police Station, Guda Malani received an information to the effect that Harak Chand S/o Khangar Mal Oswal resident of Ratanpura is trading in opium and at about 12-12:30 A.M. he will be coming in the territory of Ratanpura with opium for selling the same. Harak Chand has purchased 1 Kg. Of opium from some Vishnoi. This information was transmitted to the Superintendent of Police through telephone. The S.P. instructed him to arrest the person.

3. On receipt of the information he along with police officials Shanker Singh HC, Moola Ram and Achla Ram constables set out for Ratanpura and when they reached towards west side of the village where Khuma Ram S/o Lumba Ram Jat was going on the way near bushes, they took him along with them as Motibir. They camouflage their jeep under the nearby bushes. At

about 12:30 P.M. a man was seen coming towards the village. They surrounded him and inquired about his name to which the person told them his name as Harak Chand. He was having a towel on his left shoulder. When opened and checked the towel, there was a polythene bag in which opium milk was found, which when weighed was found to be 1 Kg., out of which 30 gms. was taken out separately as sample and rest of 970 gms. was sealed in the same polythene bag. Both packets were sealed separately. A recovery memo of the opium milk was prepared. The accused was not having any valid licence for opium. A case under Section 17 & 18 of the N.D.P.S. Act was registered.

4. In all 7 witnesses were examined by the prosecution in support of their case. The contraband recovered was found to be opium by the report Ex.P9 of the expert. The accused in his statement under Section 313 of the Code of Criminal Procedure denied the seizure and disowned the bag and pleaded that because of the enmity with Khuma Ram he has been falsely implicated.

5. In support of the appeal learned counsel for

the appellant argued that only police officials have given their statements in support of the prosecution case and the Motbir P.W.3 Khuma Ram has given the statement because of the enmity with the accused. The Investigating Officer has not complied with the statutory provisions under Sections 42,50 & 55 of the Act. The statements of the witness about the alleged search of the accused is full of infirmities and contradictions. The record prepared and information reduced to writing by the Investigating Officer on getting the information from the informant regarding the accused has neither been reduced in writing nor has been sent to the higher police authority in compliance of Section 42 of the N.D.P.S. Act. The recovered contraband has not been produced in the court during trial and the seal which affixed on the spot on the sealed packet was intact.

6. Per contra, the learned Public Prosecutor supported the judgment and argued that the oral evidence tendered is reliable & corroborative. Simply because there is admitted enmity of accused with Motbir P.W. 3 Khuma Ram, the rest of the corroborative evidence tendered cannot be thrown out. The illegal

contraband was seized from the possession of the accused. It is not a case of personal search, in such a situation the compliance of Section 50 of the N.D.P.S. Act is not to be taken care of. The F.S.L. report Ex.P9 also reveals that after due analysis it was found to be opium, which proves that an offence has been committed by the accused having possession of contraband. The trial court has rightly convicted and sentenced the accused.

7. P.W.6 Padam Singh the I.O., who is complainant has given the statement in support of F.I.R. Ex.P8, who prepared the recovery memo Ex.P4 and arrest memo Ex.P5. His statement has been corroborated by the police officials – P.W.4 Shanker Singh and P.W.5 Achla Ram, who were with him during the investigation. As per their statements seized contraband one packet for chemical analysis having 30 gms. of opium and the another 970 gms. were separately sealed and deposited intact in Malkhana of the Police Station.

8. The other set of evidence about the taking of sample to F.S.L., Jaipur is of P.W.2 Jethu Singh and

P.W.7 Narayan Ram, who received the contraband from Malkhana Incharge P.W.1 Bhera Ram in sealed position and after taking it to S.P. Office, where Jethu Singh completed the formalities and the same was deposited in F.S.L., Jaipur by obtaining a receipt Ex.P10

9. The only independent Motbir witness is P.W.3 Khuma Ram, who stated and admitted that he has enmity with accused Harak Chand. In his cross examination on being asked he admitted that the police was having opium in its possession when he reached at the Police Station and in the next breath he has admitted that Harak Chand came after he reached on the spot and all the papers were prepared in the Police Station. So it can very well be inferred that his statement cannot be relied upon, as this is not in consonance with the statement of other prosecution witnesses. No other independent witness of the recovery of the contraband has been produced by the prosecution.

10. This was the oral evidence produced by the prosecution. The main argument of the counsel for the appellant is about the non-compliance of Section 42, 50

& 55 of the N.D.P.S. Act stating that when the S.H.O. Was having prior information about commission of offence and he recorded the same in the Rojnamcha then it was his prime duty to have sent the information to his higher authority under Section 42(2), but he failed to do so and the non-compliance of this section is fatal. Secondly when person's personal search is conducted by the investigating agency it was the prime duty of the police officer to have apprised the accused about his right to choose whether the accused is likely to be searched by the police officer in presence of nearest available Magistrate or a Gazetted Officer. But this was also not done by the investigating agency and the accused has been deprived of his valuable right about the search. Thirdly, the recovered contraband opium has not been produced in court which is also fatal to the prosecution case. The recovery so made if it is proved, cannot sustain the conviction given by the trial court. The learned counsel has cited 2004 SCC (Cri.) 607 (Krishan Kanwar vs. State of Raj.), 2007 Cr.L.J. 880 880 (Dilip & Anr. Vs. State of M.P.), 2003 Cr.L.J. 4985 (Jitendra & Anr. vs. State of M.P.) in support of his contentions.

11. Now, it is well settled by catena of judgments of the Apex Court that non-compliance of Section 42, 50 of the N.D.P.S. Act do not vitiate the trial but it causes prejudice to the accused and renders the search illegal. The conviction and sentence of the accused based solely on the recovery of contraband cannot be sustained unless the provisions under Sections 42, 50 of the N.D.P.S. Act are complied with.

12. Section 42 enables certain officers duly authorised to enter into and search any building, conveyance or enclosed place without warrant, if officer has reason to believe from personal knowledge or information given by any person and has taken down in writing any offence under Chapter IV of the N.D.P.S. Act has been committed, he may between sunrise and sunset do the act enumerated in (a) (b) (c) (d) of Clause (1). Sub Clause (2) mandates that if officer has taken down in writing under Sub Clause (1) he shall forthwith send a copy thereof to his superior officer. In State of Punjab vs. Baldev Singh reported in 1999(6) SCC 172 it has been held that any police official without any prior information conducts search under Cr.P.C. and causes arrest of a person in the normal course of

investigation in which an offence is committed and on completion of that search if any contraband under the N.D.P.S. Act is recovered the requirement of Section 42, 50 will not be attracted. But if he has prior information, and has taken down it in writing or records grounds for his belief about the commission of offence under Chapter IV it is a must for the officer to comply with Section 42(2) of the N.D.P.S. Act and to send a copy of information within 72 hours to his superior. In State of Punjab Vs. Balbir Singh reported in 1994(3) SCC 299, it has been held,

“Under Section 42(2) the empowered officer who takes down any information in writing or records the grounds under proviso to Section 42(1) should forthwith send a copy thereof to his immediate official superior. If there is total non-compliance of this provision the same affects the prosecution case. To that extent it is mandatory. But if there is delay whether it was undue or whether the same has been explained or not, will be a question of fact in each case.”

13. So far as the compliance of Section 42(2) of N.D.P.S. Act is concerned, it is clearly borne out that it has not been complied with and no information of whatsoever after recording the information of the informant the S.H.O. sent the information to his higher police officer. Along with this the contraband article

seized was not produced in the court. Non-compliance or contravention of Section 42 would affect the prosecution and vitiates the conviction as this being the provision to be followed and complied with. The non-compliance is fatal for the prosecution and completely vitiates the conviction. In such circumstances the illicit article seized during the illegal search cannot be used as evidence or proof of unlawful possession of that article and cannot entitle the prosecution to raise a presumption under Section 54 of the N.D.P.S. Act.

14. In the instant case the accused was having a towel on his left shoulder, which when opened and checked by the Investigating Officer there was a polythene bag in which opium was found. The taking of towel from shoulder of the accused cannot said to be a personal search by the I.O. The towel was on his shoulder only and cannot be equated with the recovery from the person of the accused by a personal search. In *Gurbax Singh vs. State of Haryana* reported in 2001 Cr.L.J. 1166 there was a recovery from the plastic bag belonging to the accused on which accused was found to be sitting in the railway compartment. It was held that Section 50 of the N.D.P.S. Act is not applicable.

Section 50 comes into play only when a personal search of the person of the accused is made by Investigating Officer and it is clearly distinguishable from the search made from the bag, container, suitcase or premises. So in the instant case, the personal search of the accused was not made because the recovery is from a bag, which was in his hand. In this situation the question of Section 50 coming into play will not arise and the learned counsel's argument about non-compliance will be of no avail.

15. The arguments of the learned counsel for the appellant about the non-compliance of Section 55 of the N.D.P.S. Act is of no avail for the accused, as nothing could be shown as to how there was violation of Section 55. The contraband was deposited in Malkhana in sealed condition and from there to F.S.L. In sealed situation as the report Ex.P10 and the testimony of prosecution witnesses shows that sample was received in sealed condition and intact.

16. Above being the position and the discussion reveals that the non-compliance of the mandatory provisions entitles the accused for acquittal and appeal

deserves to be accepted.

17. Resultantly, the appeal of the accused is allowed and the conviction and sentence passed by the Additional Sessions Judge, Barmer vide order dated 20.5.1988 is set aside. The accused is on bail. His bail bonds stand cancelled.

(BHANWAROO KHAN) J.

BKS/-